

No. 12028
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the
Southern District of California
Central Division

HON. JACOB WEINBERGER, JUDGE.

APPELLANTS' OPENING BRIEF.

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

Introductory Statement.

Appellants present herewith their joint opening brief.

The indictment charges twenty-seven defendants with an alleged violation of U. S. C. Title 18, Section 338—Mail Fraud—in eighteen separate counts. The indictment was dismissed as against eighteen of the defendants; the case was tried as to nine defendants only. Of the nine defendants, four were found not guilty on all eighteen counts. The Court declared a mistrial as to three of said defendants, Earl H. Rhodes, Richard L. Sippel, and Ray F. Martin for the reason that the jury could not reach a verdict after approximately 102 hours of deliberation. Appellants Ernest H. Bridgman and Jay C. Henson were each acquitted on seventeen of said eighteen separate counts in said indictment. Defendant Ernest H. Bridgman was found guilty on Count IV only, and defendant Jay C. Henson was found guilty on Count VII only.

The indictment (18 counts) covers a period from prior to August 14, 1945, and continuing to November 4, 1946—as described in detail in paragraph 1, pages 1, 2, and lines 1 to 19, inclusive, of page 3 of the indictment. These identical facts, dates and names, are incorporated by reference in the remaining seventeen counts as paragraph 1 of each count. The only possible difference between the individual 18 counts consists of paragraph 2 of each count (approximately 7 lines) which concerns an individual letter which the *defendants* are charged with causing to be placed in the mail—for the purpose of executing the aforesaid scheme and artifice, and attempting to do so.

At the commencement of the Government's case motions for judgment of acquittal were made by all nine defendants. Motions were denied. [R. 45, 54, 55.]

At the conclusion of the Government's case a motion for judgment of acquittal for all nine defendants was made and granted as to 13 counts in the indictment; denied as to Counts III, IV, VII, XIV and XVII. [R. 3536-3538.]

The case was tried for approximately 59 trial days, covering approximately 14 weeks. At the conclusion of the evidence motions were again made for judgment of acquittal by all defendants on the remaining Counts III, IV, VII, XIV and XVII. Motions were denied. [R. 3538.] August 11, 1948, motions for judgment of acquittal or for a new trial were made in behalf of both appellants and denied. [R. 5, 15.]

The indictment specifically charges that from August 14, 1945, and continuing to November 4, 1946, defendants (27 named) devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers

of certain vending machines—and to obtain money and property by means of following false and fraudulent schemes—well knowing at the time that the pretenses, representations and promises would be false when made (14 specifications are listed).

The facts showed that defendant Earl H. Rhodes was the sole owner of the Los Angeles Manufacturing Co., which was engaged in the business of manufacturing 1 cent and 5 cent vending machines. Defendant Earl H. Rhodes advertised for distributors to sell said vending machines under a distributor's contract. There were seventy or more distributors. [R. 207.] Twenty-seven of the seventy were indicted. Appellants are two of the twenty-seven.

Appellant Ernest H. Bridgman, as to Count IV, and appellant Jay C. Henson, as to Count VII, respectfully complain:

1. That the verdicts, as to each of said two counts, are inconsistent with the verdicts as to the remaining four counts submitted to the jury in that they cover the identical period of time from prior to August 14, 1945, and continuing to November 4, 1946; they also cover the identical essential element of specific intent, one single scheme, as specifically described in paragraph 1 of Count I, which is identical with paragraph 1 of each and all of the remaining seventeen counts.

2. That appellants were and are the victims of a mass trial in that appellants were compelled to sit in a court room for 14 weeks and listen to testimony of witnesses

from several different parts of the United States, the majority of whom had never seen or met appellants—particularly after the United States Attorney filed a written trial memorandum in the trial court, stating “That he expected to call approximately 25 witnesses, that the trial would require 3 weeks and that he expected the trial would be had on all counts.”

3. That prejudicial error was committed in the Court’s blanket introduction of the testimony of all witnesses against all defendants. This point, closely related to our mass trial objection, is in effect an exception to a gross example of the “guilt by association” technique. The only connecting link between the several defendants was the fact that they engaged in the same general line of business, the sale of vending machines. There was no conspiracy, actual or constructive, no partnership, no joint enterprise, no agency or other mutual relationship to establish a foundation for the evidence so sweepingly admitted.

4. That there was no substantial evidence to establish a “scheme” in which appellants jointly participated, within the meaning of 18 U. S. C. A. 338.

5. That the Court committed prejudicial misconduct in refusing to advise the jury that one co-defendant has the right to cross-examine the witnesses called by another co-defendant.

6. That the Court committed prejudicial error in limiting cross-examination, under the rule of *Alford v. United States*.

Statements of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

JURISDICTION OF THE DISTRICT COURT.

The conviction and judgment from which the appeal is taken was based upon an indictment returned and filed by a grand jury in the District Court of the United States for the Southern District of California. In this indictment, twenty-seven individual defendants are charged with violating U. S. C. Title 18, Section 338 (Mail Fraud) in eighteen consecutive counts in that prior to August 14, 1945, and continuing to November 4, 1946, said twenty-seven defendants devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers of certain vending machines—and that under various names, would induce to purchase certain nut vending machines, known as Star 1¢ Vendor and Sun 5¢ Vendor, and obtain money and property by means of following false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made. The indictment then lists approximately fourteen separate alleged misrepresentations, and in the following paragraph, it refers to a letter which defendants allegedly authorized to be placed for deposit in the United States mail to a certain individual. Except for a seven line paragraph (number 2) concerning an individual letter in each of the eighteen counts, all counts are identical.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court appears from the indictment and the pleas of not guilty and the Notice of Appeal. Jurisdiction is invoked under Section 128 of the Judicial Code as amended (U. S. C. A. Title 28, Chapter 6, Section 225A).

I.

Inconsistent Verdicts Require Reversal.

Appellants are two of nine defendants who were tried jointly for violation of the mail fraud statute, from about August 14, 1945, and to November 4, 1946, as described in detail in paragraph I on pages 1 and 2, and lines 1 to 19, inclusive, of Count I of the indictment.

These same allegations, dates and names are reincorporated by reference in the remaining seventeen counts.

The case was tried for approximately 59 trial days, covering fourteen weeks, as to Counts III, IV, VII, XIV and XVII. One single scheme was alleged in each count.

Defendants Alexander, Carner, Johnson and Wilson were acquitted on all five counts.

Appellant Bridgman was acquitted on Counts III, VII, XIV and XVII, and found guilty as to Count V only.

Appellant Jay C. Henson was acquitted on Counts III, IV, XIV and XVII, and was found guilty as to Count VII only.

The jury were excused on their report of inability to agree as to the findings as to the other three defendants, Rhodes, Martin and Sippel.

Appellant Henson sat in court and listened to the testimony of twenty-four Government witnesses for approximately fourteen weeks, during which time only three testified concerning him. [David McFarland, R. P70, 120; Henry B. Wiesley, R. 1796; Lawrence H. Leibrand, R. 1886.] During the same fourteen weeks only five of the twenty-four Government witnesses testified concerning Ernest H. Bridgman. [David McFarland, R. 96; Harry L. Raymond, R. 2347; James Warshim, R. 2571 (and at the conclusion of James Warshim's testimony all of it was

stricken [R. 3559, line 15]); Marshall J. Hendricks, R. 2952; and Stephen Littlefield, R. 3001.] At the conclusion of the Government's case all of the evidence, theretofore introduced in relation to one particular defendant, was introduced, over objection of all defendants, in relation to or against all defendants. [R. 3536.]

Ernest H. Bridgman and Jay C. Henson, appellants, had never known each other, had never met each other, and had never seen each other prior to coming to court as defendants in this case. [R. 6308, 5322, 5403.]

The logical inconsistency of the verdicts is indisputable. Messrs. Bridgman and Henson did not even know and had never met each other. [R. 6308.] The sole connecting link between them was the central figure, defendant Rhodes, with whom each was acquainted. Mr. Rhodes was the author of the letter [Exhibit 10] on which Count VII was based and of which appellant Henson was convicted. Further, Mr. Rhodes mailed this letter in Los Angeles while Mr. Henson was in Iowa. It is therefore obvious as a matter of law that if Henson was guilty under the seventh count, *a fortiori* Rhodes was guilty, equally, if not more clearly guilty. Yet the same jury which voted Henson's conviction could not agree whether Rhodes had the requisite *mens rea*. No one but a sophist would even care to argue that such reasoning was fair, honest or logical. Unfortunately, too much Grecian sophistry has been introduced into some cases on this subject of what verdicts will be upheld in spite of their unintelligibility on rational grounds. It would seem that the mass of irrelevant testimony and the long, harassing trial confused the jurors or so prejudiced them, or some of them, either against these appellants or in favor of Rhodes, that fair and consistent findings were rendered a

practical impossibility. Only a series of impossible compromises could and did result.

It is easy to argue that these appellants should not escape just because a jury wrongfully or inconsistently failed to render justice to another accused. It is difficult to affirm positively that a jury so constituted gave a fair and impartial verdict against these appellants. It is obvious that the jury was either unfair to these appellants or that it was unfair to the Government in its deliberations and verdicts, or unfair to all parties. Due process of law and good logic should both require that this unfairness should be resolved in a new trial. The Government automatically will get a new trial as to Rhodes, but these appellants will not obtain that new trial unless this Court so orders.

The case law on inconsistent verdicts is by no means simple or easy to apply. Its origin traces to comparatively uncomplicated factual situations, as for example, where three men were jointly indicted for conspiracy and the verdict found that *A* conspired with *B* or *C*. At common law such an alternative verdict was void.

Regina v. Thompson, 16 Q. B. 832.

Similarly where many were indicted for riot but only two were convicted, the verdict was void since at common law the minimum number who could riot was three.

2 Hawkins, *Pleas of the Crown* (8th ed. 1824) 621.

It is well to bear in mind, in examining this problem of review of illogical verdicts, the sage remarks of the great common law authority, Sir Wm. Blackstone, in his *Commentaries* (1772), Volume 3, Chapter 23, page 381, said:

“Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the

trial by jury in practice, *would be by endeavouring to remove all the defects*, as well as to improve the advantages, incident to this mode of enquiry * * *.” (Italics supplied.)

If the same offense is charged in two counts of an indictment, or in two indictments consolidated for trial, acquittal on one count will bar conviction on the other. The test is whether the same evidence will support both counts.

Hughes v. U. S. A. (C. C. C. 5th 1938), 95 F. 2d 538.

Where a verdict of guilty on one count and not guilty on other counts is rendered, the verdict of guilty must be based upon evidence other than that pleaded in support of other counts.

John Hohenadel Brewing Co. v. U. S. A. (C. C. A. 3rd 1924), 295 Fed. 489.

Where the elements of two offenses are identical, a verdict of not guilty on one count is inconsistent with a verdict of guilty on the other.

People v. Doxie (1939), 34 Cal. App. 2d 511, 93 P. 2d 1068.

When accused is convicted on one count and acquitted on another count, the test is whether the essential elements in the count wherein accused is acquitted are identical and necessary to proof of conviction on the guilty count.

People v. Hickman (1939), 31 Cal. App. 2d 4, 87 P. 2d 80;

Commonwealth v. Kline (Penn. 1933), 107 Pa. St. 594, 164 Atl. 124.

SINGLE OFFENSE IN SEVERAL COUNTS.

Where but one offense is charged in several counts, a verdict of guilty on one count and of not guilty on another is inconsistent and will not support a judgment. And the verdict of an acquittal operates as the acquittal of the offense, although the accused is found guilty on the other count.

State v. Akers (1919), 278 Mo. 368, 213 S. W. 424;

People v. Puppil (1929), 100 Cal. App. 559, 280 Pac. 545.

It is conceded that if the same offense is charged in two counts of an indictment, or in two indictments consolidated for trial, the acquittal of one count will bar conviction on the other.

Speiler v. U. S. A. (C. C. A. 3rd), 31 F. 2d 682;

Bertsch v. Snook (C. C. A. 5th), 36 F. 2d 155;

Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153 (Held, no reversible error because the possession and conspiracy were determined to be different offenses).

In criminal prosecutions, verdicts in a number of cases impossible in legal theory because of the nature or the kind of offense or offenses in question have been held void.

People v. Richard, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716;

People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168;

Annotation, 80 A. L. R. 171.

When the liberty of a citizen is at stake, the jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time.

Speiler v. U. S. A. (C. C. A. 3rd 1929), 31 F. 2d 682.

Where the inconsistency of a verdict appears only from an examination of the evidence and constitutes an illogical discrimination between joint defendants, as to which the evidence is identical, it is invalid. Thus, where two persons were jointly indicted and tried for an unlawful sale of liquor, and the evidence against each was precisely the same, it was held that a verdict finding one defendant guilty, the jury disagreeing as to the other, should be set aside.

Davis v. State (1898), 75 Miss. 637, 23 So. 770, 941.

So, where the evidence against four persons jointly indicted and tried for theft is precisely the same, the jury upon finding three of the defendants not guilty, cannot be permitted to find the fourth guilty.

Territory v. Thompson (1929), 26 Haw. 181.

FEDERAL CASES.

Several Federal cases have been cited and argued by counsel for all parties in earlier stages of this case, and it is appropriate to re-examine them on this appeal.

In *Kotteakos v. U. S. A.* (1946), 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, one of the reversible errors was held to be the utter impossibility of the jury's implied finding of a single conspiracy on evidence which indicated multiple schemes. The same situation here prevails, inasmuch as it is logically impossible to affirm that two defendants, each unacquainted with the other, are guilty participants in a systematic mail fraud, while at the same time, other similarly situated businessmen are innocent and the ringleader and some others are not proved either guilty or innocent by the evidence.

The rule in *Muench v. U. S. A.* (C. C. A. 8th 1938), 96 F. 2d 332, is that the jury's findings of innocence on other counts cannot require reversal of otherwise consistent verdicts on the counts as to which convictions were returned. The case would seem to recognize that inconsistency as to a specific count, as between co-defendants, is prejudicial error.

In *U. S. A. v. Hare* (C. C. A. 7th 1946), 153 F. 2d 816, the Court refused to nullify an allegedly inconsistent verdict which convicted corporate officers of sales over ceiling prices while acquitting the corporation. In such a situation the corporation could not possibly be guilty unless the *persons* who acted on its behalf, either as agents or as co-principals, were guilty. The evidence was clear and no particular *mens rea* was in issue. The apparent inconsistency did not therefore result in a miscarriage of justice. Such facts are a far cry from a situation where Henson is convicted for what Rhodes did by a jury which in its utter confusion or irrational bias was unable to determine whether Rhodes was guilty or innocent.

Likewise, the case of *Chiarvalloti v. U. S. A.* (C. C. A. 7th 1932), 60 F. 2d 192, is, by analogy and extension, a precedent for reversal here. There one defendant was convicted and the other acquitted of a joint charge of attempting to bribe a public official. The Court stated clearly that “* * * the evidence was not the same in all respects.” But no one can argue that where *A* sends a letter and the jury convicts *B* but not *A* of sending such letter, that the evidence is not the same in all essential respects.

The Government has relied heavily on the majority viewpoint of Mr. Justice Holmes in *Dunn v. U. S. A.* (1932), 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161. The case, however, is clearly distinguishable, since it merely laid down the rule that inconsistent findings as to separate counts do not constitute reversible error. The 8th Circuit has so regarded the case in *Downing v. U. S. A.* (C. C. A. 8th 1946), 157 F. 2d 738, stating:

“The Dunn case settled the question, however, when the Supreme Court refused to reverse a conviction for inconsistency in verdicts on the separate counts of an indictment * * *.”

In considering whether the rule of *stare decisis* should lead the Court to apply or extend the doctrine of *Dunn v. U. S. A.*, cited *supra*, to affirm the inconsistent verdicts in this case, it is well to call to mind the comment which Blackstone made on the fact that the English Courts foolishly followed certain technical and unfounded precedents over a long period of time:

“The precedents then set were afterwards most scrupulously followed, to the great obstruction of justice, and the ruin of the suitors; who have formerly suffered as much by these obstinate scruples and literal strictness of the courts, as they could have done even by their inequity.”

3 Blackstone's Commentaries (1772), Ch. 25, p. 410.

Inconsistent verdicts are likewise considered beneath the standard required for judicial approval in civil cases.

East St. Louis Cotton Oil Co. v. Skinner Bros. (C. C. A. 8th 1918), 249 Fed. 439 (Reversing a verdict for plaintiff on an account stated which also found for defendant on an inconsistent theory of special contract alleged in a counter-claim).

A compromise verdict is objectionable where there is an unjustifiable concession of principles controlling the decision.

Goelet v. Ward Co. (C. C. A. 2d 1917), 242 Fed. 65.

SUMMARY.

Although we concede that some plausible argument can be weakly made on the basis of some prior cases that inconsistent verdicts, such as were here rendered, may be upheld, nevertheless we earnestly contend that such precedents are out of line with the weight of respectable authority and wholly inconsistent with anything but sophistry as a theory of the administration of justice. The verdicts here rendered were eminently unfair. No case should be started, or tried, and no defendant should be punished, on the theory that a jury may convict some defendants, while acquitting and disagreeing as to others, in a highly illogical fashion. The same law which requires reasonable doubt to be resolved in favor of defendants can certainly not vest unreasonable and irrational discretion in a jury.

II.

Unconstitutional Mass Trial and Prejudicial Misjoinder Require Reversal of Judgments.

The two appellants were tried under an indictment containing eighteen counts and naming twenty-seven defendants. As to eighteen defendants, it was dismissed, and the remaining nine were tried before a single jury. These two alone were convicted, each on a single count of the indictment, each under a different count, and each being acquitted on other counts. Of the other defendants, four were entirely acquitted and as to three, the jurors disagreed. The trial consumed fifty-nine court days. The reporter's transcript contains 6578 pages. The trial lasted from May 5, 1948, to August 8, 1948, a three-month period.

The defendants and appellants frequently and repeatedly objected to the mass trial and to its consequent effects of duplication, repetition, delay and harassment. [R. 2691, 2693, 2694, 3353, 3382, 3555, 3575, 3576, 3577, 3900, 3953, 3954, 4150, 4686, 4687, 4689, 4694, 4695.] All objections were overruled by the Court.

No one could foresee, when the trial commenced, that the prosecution would delay the trial and deprive defendants of any semblance of a speedy and fair trial. The able prosecutor estimated, in fact, that the trial would last three weeks. (Govt. Trial Memo, par. I, E.)

No direct case authority has been found establishing a rule that it is unconstitutional or reversible error to conduct such a mass trial for fifty-nine days. However, it seems elementary that due process of law and the right to a fair and speedy trial place some maximum limit on the time which the prosecutor and the trial court can force defendants to spend in litigation of a criminal indictment.

Surely five years, three years, or even one year would be clearly beyond all reason in a case of this nature, and careful reflection will make it evident that fifty-nine trial days is far beyond the discretion which a trial court should have in a free country to make citizens defend themselves against such charges as were here involved. If every American citizen and businessman can be subject, at the Government's will, to the bankrupting harassment of this type of prosecution, then the vaunted civil liberties which are our proud possession may be substantially nullified and crushed by such cruel and inhuman prosecution tactics.

General language concerning the background of the applicable constitutional provisos, and the *ratio decidendi* of leading cases, may be cited and quoted in support of the proposition here contended for. The right to a speedy trial would be meaningless if it is a right only to a trial which *begins* in a reasonable time after indictment, and if it does not include the right not to have the trial bog down in irrelevant detail and a mass of evidence relating to others and not connected up with these individual defendants and appellants. In *Shepherd v. U. S. A.* (C. C. A. 8th 1947), 163 F. 2d 974, the Court said, regarding the Sixth Amendment:

“The constitutional provision was intended to prevent the oppression of the citizen by delaying criminal prosecution for an indefinite time and to prevent delays in the administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecutions. *A speedy trial, generally speaking, is one conducted according to prevailing rules, regulations and proceedings of law, free from arbitrary, vexations and oppressive delays.*” (Italics supplied.)

The purpose of a speedy trial has been elsewhere described as a protection from the harassment of criminal prosecution, and from the attendant anxiety and the danger of the loss of witnesses through delay.

Ex parte Peckcrill (D. C. Tex. 1942), 44 Fed. Supp. 741.

The Supreme Court fairly recently reversed a conviction, partially upon the ground that a vast amount of legally irrelevant evidence had been admitted, tending to indicate some eight different conspiracies, where the indictment had charged a single confederation. The Court, speaking through Mr. Justice Rutledge, said:

“The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place. * * * [The defendants have] * * * the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others * * *.”

Kotteakos v. U. S. A. (1946), 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, 1571-1572.

It is submitted, with all respect to the learned trial judge, that if a Court can be permitted to try and convict these appellants “*en masse* for the conglomeration of distinct and separate offenses committed by others,” as shown in the record—for a three-month period—then the language of Mr. Justice Rutledge in the *Kotteakos* case is without substance, and a new form of tyranny has been invented by which a growing bureaucracy can harass and punish citizens in spite of the proud and specific guarantees of our Constitution.

The mass trial procedure of allowing numerous witnesses to testify against a single defendant—reserving the right to offer such testimony against the others—substantially deprived the appellants of the constitutional right to be *confronted with the witnesses against them*. Although the counsel for each appellant was permitted to cross-examine each witness, it would be obvious that counsel could not adequately cross-examine a witness without knowing for sure whether the testimony would even be offered against his defendant. And if the evidence were later offered, after counsel had declined to examine, the defendant would in effect be subject to a witness who had not been cross-examined.

Where the practice is used as to only a few witnesses, as in a conspiracy trial, perhaps prejudice would not ensue. But in a mass trial for seventeen weeks, defense counsel were placed in a dilemma—either they cross-examined and thus gave the jury the psychological inference that the witness had said something against appellants—or they failed to examine and thus neglected their clients' defense in case the testimony was thereafter admitted against their clients.

It is submitted that placing counsel in such a dilemma is a substantial and prejudicial deprivation of the right of confrontation of witness, as contained in the Bill of Rights, Sixth Amendment, United States Constitution.

MISCARRIAGE OF JUSTICE.

Misjoinder of separate offenses by separate individuals, unknown to one another, has been held prejudicial, even in situations where the trial *en masse* did not result in burdensome delays.

The leading case on this particular subject is that of *McElroy v. U. S. A.* (1896), 164 U. S. 76, 41 L. Ed. 355, 17 S. Ct. 31. In the *McElroy* case four indictments were consolidated for trial. The first indictment charged the murder of *A* by all six defendants. The second indictment charged a felonious assault on *B* by all six defendants. The third indictment charged arson of *C*'s house by all six defendants. The fourth indictment charged arson of *D*'s house by four of the six defendants. The crimes in the third indictment occurred two weeks after the offenses described in the other three true bills. The jury convicted five of the defendants. The United States Supreme Court reversed the convictions and spoke very caustically of the practice of "embarrassing the defense" by a "multiplicity of charges." The Court, speaking through the Chief Justice, said (at p. 81, 41 L. Ed. at 357):

"* * * such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. *It cannot be said that in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions* * * *." (Italics supplied.)

The general principle of the *McElroy* case, it is submitted, is basic to any concept of a fair trial. If the defense can be embarrassed and the jury's attention diverted in a case involving only *four* defendants on trial for *four* transactions on *two* days, how much more obvious is the prejudice where *nine* defendants are tried for *eighteen* separate transactions, occurring on many different dates

over a period of *fifteen* months! (Count One of the Indictment.)

The defenses of the several defendants here were antagonistic in this sense: they were not mutually acquainted; they did not cooperate in any way in the sales program; each made his sales individually and his alleged representations and conversations should not be binding on the others in any fair system of justice.

Cf.:

U. S. A. v. Noble (D. C. Mont. 1923), 294 Fed. 689;

U. S. A. v. Rockefeller (D. C. N. Y. 1915), 222 Fed. 534;

People v. Lehne (1935), 359 Ill. 631, 195 N. E. 458.

CONSPIRACY DIFFERENTIATED.

It is true that where a large number of parties conspire to defraud, they *invite* a mass trial, and if one results they are hardly in a position to complain. See, for example, the mass trial of fifty-seven conspirators in *U. S. A. v. Gilbert* (1939), 31 Fed. Supp. 195. The *Gilbert* case points up the gross injustices of a mass trial, but finds justification in the common knowledge of the defendants that they were participants in a huge conspiracy.

Here, however, the several defendants had no reason to suspect that they were doing anything illegal, much less anything indicative of a major conspiracy or even of a joint scheme to use the postal facilities to defraud. They did not invite a mass trial in any sense.

In the case of *Castellini v. U. S. A.* (C. C. A. 6th 1933), 64 F. 2d 636, the Court reversed convictions upon a consolidated trial of three persons under two indictments. The Court said, in part (at p. 638):

“We cannot but regard it as prejudicial to the right of appellant to a fair and impartial trial that

he should be required to stand trial at the same time and before the same jury upon 25 counts of one indictment, each charging him (the bank president) jointly with two others with a felony, and upon two counts of another indictment, each charging him jointly with one other with another and distinct felony. We cannot overlook the rule in the McElroy case, *i. e.*, that appellant should not, according to the ancient formula 'be confounded in the making of his defense' * * *.

"The necessity for the rule cannot be better demonstrated than by the course of the trial, which continued for something like two weeks, and which is reflected in a bill of exceptions of 580 pages. In addition the government introduced more than 200 documents, exhibits, . . . mostly on one count.

. . .

"We cannot say that these errors did not prejudice appellant in his substantial rights." (Italics supplied.)

If such a *two week* trial on *two* indictments of *three persons*, with 580 pages of transcript and 200 exhibits is confusing to a jury, it would seem to require considerable mental flexibility to stretch the rules of a fair trial to cover up the confusion shown in the 6578 page record here of a *fourteen week* trial!

Compare, also, the trial of *nine* defendants for conspiracy and *five* defendants for sale of opium, which was reversed for improper consolidation.

De Luca v. U. S. A. (C. C. A. 2d 1924), 299 Fed. 741.

SUMMARY.

It thus appears that the mass trial of these appellants, along with the other defendants, occurred under conditions which prevented a fair trial and therefore requires a reversal of the judgments.

III.

Prejudice Ensued From Blanket Order Admitting All Evidence Against All Defendants.

The admission against appellants, by a sweeping order of the trial court, of a mass of incompetent, irrelevant and immaterial evidence of witnesses who had originally testified only in relation to other defendants rendered the trial unfair and unconstitutional, and deprived each appellant of his right to be confronted with the witnesses against him and to cross-examine such witnesses. Moreover, it constituted judicial misconduct which biased the jury.

No tenet is more highly enshrined in our constitutional and common-law system than the principle that no man may be convicted of a crime unless there is either direct or circumstantial evidence of his personal guilt thereof.

We do not recognize the Marxian-fascist-totalitarian "guilt by association" process. Nor do we allow a man to be convicted of a specific offense because of his other misconduct or his general bad reputation.

Testimony must be by percipient witnesses, and hearsay, conclusions, and personal opinions are excluded.

In this case, the prosecutor used a clever, though not novel, procedure. Each witness was called to testify against a specific, named defendant, "reserving the right to offer his testimony against other defendants." [R. 580, lines 9 to 23.]

Each defendant's counsel was permitted to cross-examine, but such opportunity presented a dilemma: where a witness was called against defendant *A*, then *B*'s counsel could decline to cross-examine, but if the prosecution later offered the testimony by motion against *B*, it would be claimed that *B*'s counsel had waived his right of confrontation and cross-examination.

It would seem that a more proper procedure would be for the prosecutor to offer the testimony against all defendants whom he honestly believed it to involve, *subject to a motion to strike if it were not later connected up*. Then, each defendant would know where he stood.

The gist of this exception, of course, is that this mass of testimony was not connected up to these appellants. No conspiracy was proved, which could render each conspirator liable for the actions of the others. No common scheme was shown, and even if such a scheme were shown it would not render such evidence proper without a showing of conspiracy, agency or some connecting link.

The prosecutor's motion to obtain this all-inclusive order, came on June 17, 1948, after over six weeks of trial. [R. 3536, lines 16-23; R. 3537.] It is humanly impossible for anyone to recall and weigh fairly all the testimony of such a period, and the trial judge frequently referred disputes about prior testimony to the jury's memory.

The difficulty of a long trial is recognized in the important case of *U. S. A. v. Corlin* (D. C. Calif. 1942), 44 Fed. Supp. 940, at 949:

"The arduous task imposed upon me by the trial
* * * of three weeks, * * *. And * * *
after a thorough consideration of all the evidence
* * * I am of the view that the Government has
failed to prove, beyond a reasonable doubt, that any
of the defendants is guilty * * *."

If a learned trial judge like the Honorable Leon R. Yankwich must frankly confess such difficulty in a three weeks' trial, how much actual memory can be expected of an inexperienced body of jurors?

This objection is closely related to the *mass trial* error, and serves to emphasize the essentially un-American and unfair nature of the long-drawn-out trial.

One defendant is criminally liable as principal for the acts of another as his agent, only if he “knowingly and intentionally aids, advises or encourages the criminal act committed by the agent.”

U. S. A. v. Corlin (D. C. S. D. Calif. 1942), 44 Fed. Supp. 940, 946.

Here, there was not one scintilla of evidence to connect these appellants “knowingly and intentionally,” or at all, with the mass of testimony relating to the allegedly criminal conduct of their co-defendants.

Under the circumstances, therefore, the learned trial judge committed prejudicial misconduct in granting the prosecution motion and so informing the jury [R. 3537 and 3558 to 3561] and leading the jury to believe that a conspiracy had been legally proved, binding each appellant for the acts of his co-defendants. *The impact of such a sweeping order could not fail to impress the minds of non-lawyers*, particularly where the trial court was obviously misled as to the legal principles at stake.

To hold such an order non-prejudicial would, in effect, establish a dangerous precedent, allowing a defendant to be tried, not only on the evidence against himself but likewise on the totally incompetent-for-any-purpose evidence of a vast array of witnesses called and examined in such fashion as to render the trial both interminable and intolerable.

The Supreme Court has recently opined that evidence improperly admitted is prejudicial even where it is “doubtful” whether the jury were affected.

Blumenthal v. U. S. A. (1947), 335 U. S., 68 S. Ct. 248, 92 L. Ed. (A. O.) 183, at 190.

THE HAUPT CASE.

The Court's attention is called to the *Haupt* case, in which six defendants were tried for forty-one alleged overt acts of treason, not all of which overt acts were proved to have been participated in by each defendant. Much of the evidence was such that a jury would have difficulty in limiting it to the individual defendants to whom it had been connected up with sound proof, especially, for example, alleged incriminating statements of individuals. The Court said, with reference to background evidence as to some defendants:

“We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted.”

U. S. A. v. Haupt (C. C. A. 7th 1943), 136 F. 2d 661.

THE CANELLA CASE.

Almost on all fours is the case of *Canella v. U. S. A.* (C. C. A. 9th 1946), 157 F. 2d 470, which, relying on the *Kotteakos* case, held that *introduction of all the evidence* as against all defendants, on the single conspiracy theory, was error, when the evidence clearly showed no such conspiracy but only many separate transactions.

In another case, the Court pointed out that the only practical method to avoid the dilemma of evidence admissible against one defendant but incompetent and prejudicial to others is by separate trials.

U. S. A. v. Rose (D. C. 1940), 31 Fed. Supp. 249.

MISCARRIAGE OF JUSTICE.

In this connection it is well to bear in mind that serious error is regarded as prejudicial unless the evidence of guilt is overwhelming.

Fiswick v. U. S. A. (1946), 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196;

Commonwealth v. Blose (1947), 60 Pa. Super. 165, 50 A. 2d 744 (cites *Kotteakos* case).

DUE PROCESS.

The right to be protected from the hazard of conviction in a mass trial, as a result of evidence properly admissible only as to co-defendants, is within the scope of the due process clause of the Constitution.

Brooks v. U. S. A. (C. C. A. 5th 1947), 164 F. 2d 142.

SUMMARY.

The evidence admitted *en masse* by the blanket order of the Court was obviously incompetent and without foundation on the agency or conspiracy theories. Its prejudicial effect was such as to destroy all semblance of a fair trial within the meaning of the due process clause. The *Haupt* case establishes the inability of the jury to make differentiations which the trial judge failed to comprehend. Reversal and new, separate trials are required.

IV.

Insufficiency of the Evidence to Prove a Scheme.

Appellants urge that the evidence is wholly insufficient as to the counts of the indictment of which they were convicted for the following reasons:

Appellant Henson had no experience with vending machines [R. 5439], and answered an ad of defendant, Earl H. Rhodes, to invest in machines himself [R. 5404] and thereby met defendant Earl H. Rhodes for the first time. [R. 5404, 5323, 5436.] At that time [approximately November, 1945, R. 5436], appellant Henson was a traveling salesman, selling a book entitled "Thunder God's Gold." [Exhibit N-4, R. 5393.]

Appellant Henson saw Earl H. Rhodes only twice. [R. 5404, 5407.] Henson first investigated Rhodes by checking his references, to-wit: Dunn and Bradstreet and Security-First National Bank in Los Angeles. [R. 406, 415.] Both gave defendant Rhodes a good credit rating. [R. 5405 and 5406.] Appellant Henson went home and talked it over with his wife; the following day, Henson went out with a locator of defendant Rhodes to personally satisfy himself of the possibility of getting locations for vending machines. In three-hours' time, the locator got 40 locations. [R. 5407.] Following that, appellant Henson signed a Distributor's Sales Contract [Exhibit K-4] and became one of 70 or more distributors. [R. 207.] Appellant Henson then undertook selling the vending machines as an incident to selling his book "Thunder God's Gold." [R. 5410.]

Appellant Henson was interviewed by a postal inspector in Seattle, Washington, and made a full, fair and complete disclosure of all of his activities for two hours, and the postal inspector told him, in substance, that so far

as he was personally concerned, he could see nothing wrong with what appellant Henson was doing. This was not denied. [R. 5469, Exhibit 154.] Henson gave the postal inspector a list of persons whom he had sold in Seattle November 21, 1945.

Subsequent to the indictment, appellant Henson again made a full, fair and complete disclosure to J. H. Van Meter, and inquired if he had done anything wrong, and was led to believe that his matter might or would be dismissed, but it never was. [R. 5426 and 5428.]

Appellant Henson attended no meetings with distributors; the record shows there were none. [R. 4334.] Likewise, there was no correspondence between distributors or manufacturer (defendant Rhodes) as to activities of distributors. [R. 435, 437.]

Appellant Henson had never seen or met any of the co-defendants, including appellant Bridgman [R. 6308], prior to attending the trial in the Federal Court, except:

- a. Defendant Earl H. Rhodes, whom he met twice, and
- b. Defendant Ernest R. Alexander, who saw him once in the office. Alexander was acquitted.

As further evidence of good faith, appellant Henson had no complaints about the glass in vending machines sold by him because he had cemented the glass in the vending machines together with glass cement [R. 5413], and successfully and satisfactorily demonstrated his machines to customer Henry B. Wiesley, by rolling them on a bed. [R. 5384, 5413.]

Relative to the credibility to be given two witnesses who testified against appellant Henson, Henry B. Wiesley [R. 1809] identified appellant Ernest H. Bridgman as Jay C. Henson [R. 1809, 1810] and later admitted [R.

1852] that he had never seen appellant Bridgman before and had made a mistake. Mr. Wiesley, when asked by counsel for the Government at the conclusion of his testimony, was still unable to identify appellant Henson. [R. 1872.] The witness Wiesley told defendant, Ernest R. Alexander, in the hall that the reason he could not remember was because he had been drinking at the time. [R. 5231, 5232.] This was not denied. Both Mrs. Henson and appellant Henson testified that Mr. Wiesley had brought a bottle of whiskey to the room. [R. 5382.]

Witness Henry B. Wiesley's original complaint was slow deliveries [R. 1864, Exhibit 77], and witness Lawrence H. Liebrand's original complaint was set forth in the following Exhibit WW [R. 1958, 1974]:

"Gentlemen: I got my machines in fine shape but cannot place them in the places Mr. Henson contracted for as practically all of those places have machines which were put in from the time Mr. Henson was there till the time the machines arrived.

"P. S. Do you make a slug ejector and a small bracket for your machine."

Mr. Liebrand had never seen appellant Henson in his life before [R. 1892] and could not say whether or not the signature was Henson's.

Exhibit A (Distributor's Agreement), typical of the contract which each defendant distributor had with defendant, Earl H. Rhodes, was the only agreement in existence. [R. 265, 267.]

Defendant Rhodes was the sole owner of the vending machine manufacturing business and employed David McFarland (Government witness) as bookkeeper. [R. 70.] McFarland took all directions and instructions from

Rhodes. [R. 84.] McFarland saw appellant Henson but once. [R. 87.]

As further evidence of good faith, Henson was still sold on the machines because they had worked as well as any he had ever seen. He did not know of a single failure. [R. 5430.]

Twenty-three thousand one-cent machines were sold by Rhodes, the manufacturer [R. 377], and twelve thousand five-cent machines. [R. 377.] McFarland testified approximately two hundred complaints were received. [R. 377.] McFarland answered complaints but first, defendant Rhodes told McFarland what answers were, and McFarland used that as basis for replies. [R. 377.] Five per cent of complaints concerned nuts gumming up in the machines; fifty per cent were because of slow deliveries; forty-five per cent were due to some defect or improper operation. [R. 422.] The percentage of complaints was about ten per cent.

McFarland testified that any defective machines, or any and all defective machines returned, were fixed by defendant Rhodes. [R. 380.]

As further evidence of good faith, Gordon B. Mansfield, an inspector, testified the machines were precision-built in that class of sandcasting; that the Government's Exhibit 50 was not a fair exhibit. It would not pass inspection because the base was ground (irregular), defective, warped; the coin mechanism was fractured; the corner of the top had been sawed off; the glass chipped; the lock loose, and was not a fair sample.

Inspector William K. Lawrence [R. 4010] testified that ten per cent of the machines were rejected for defects at the factory.

Melvin Christiansen, a tool and die worker, testified that defendant Rhodes spent \$8,100.00 with him [R. 4052], and that the vending machines were 90 per cent foolproof and "as good as we could build"; that Exhibit 109-F was precision-made as near as possible to production standards.

Horace J. Burrow [R. 4192], a wood and metal pattern man for 48½ years, testified the machines were precision-built to withstand the purposes for which they were built; that defendant Rhodes had spent \$2,800.00 with Burrow; that defendant Rhodes had spent \$9,500.00 on testing the 5 and 1¢ machines.

Appellant Bridgman rented space from the Los Angeles Manufacturers under a distribution agreement. [R. 96.] McFarland received checks from Bridgman for rent. [R. 96.] Each distributor had an agreement with Los Angeles Manufacturers (Earl H. Rhodes) permitting him to sell vending machines and to purchase them from the manufacturer at an agreed price. [R. 205, 207.] Distributors were procured by advertisements in the paper by defendant Rhodes. [R. 214.]

Appellant Bridgman paid a monthly rental for his office space, kept separate books, employed his own help, and operated as an individual concern, the Bridgman Distributing Company. [R. 229, 230.]

Defendant Earl H. Rhodes carried no social security or withholding taxes on any distributor. [R. 239, 241.] The distributors traveled and the expenses were borne by themselves [R. 240].

The only thing a distributor received was the difference between the purchase price and the amount he paid for the machine. [R. 241.] All distributors, including appellants, operated under the same kind of contract. [R. 242.]

As further evidence of good faith, the manufacturers, Earl H. Rhodes, had considerable difficulty getting material [R. 441], particularly metal. [R. 442, 449.]

According to the record and the testimony, with reference to sales, they were all individual, separate sales and transactions unrelated to each other by individual distributors who had only contact with one central figure, Earl H. Rhodes. As mentioned in the *Corlin* case, there is no connecting link between the hub of a theoretical wheel, in the person of Mr. Rhodes, who was not convicted, and a rim connecting the distributors with each other. If the distributors were conceivably spokes in a wagon wheel there is no evidence of a rim to connect the spokes with a central hub figure, defendant Earl H. Rhodes.

Appellants respectfully point out the complete absence of evidence to connect up the 24 witnesses for the Government as against appellant Henson, when only four testified concerning him; likewise, against appellant Ernest H. Bridgman, when only five testified concerning him. David McFarland was one and testified that he saw appellant Henson only once. [R. 385.]

On the Government's theory of a single scheme, the defendant are likened to cars in a train with defendant Earl H. Rhodes as the engineer, but as pointed out, there is a total absence of any connecting link, acquaintanceship or knowledge of one car (distributor) with the other—the result being that, analyzed properly, it is nothing more than a series of individual transactions where the facts and the circumstances vary materially, all of which have erroneously been introduced concerning or as against all nine defendants.

V.

**Prejudicial Misconduct of the Court Requires
Reversal.**

The Court refused to instruct the jury that the counsel for appellant Bridgman had a right to cross-examine a witness called by the co-defendant Rhodes. [R. 3907, lines 1-10.]

Clearly the right to such cross-examination existed and should have been fully permitted. The Court, in fairness to defendants, should have made it clear that the co-defendants were not bound by the testimony of any witness called on behalf of any individual defendant, and that a right to cross-examine existed. Elemental fairness as well as adequate exercise of the cross-examiner's right so required.

No basis is perceived upon which the trial court could claim the right to refuse such a charge, in the exercise of its discretion.

The right of cross-examination is of the quintessence of due process of law in our system. Any such substantial abridgment of the age-old privilege is in and of itself highly prejudicial.

Undoubtedly, counsel for appellant did have the right to cross-examine the witness called by another defendant, since Bridgman and Rhodes were "adverse parties" rather than parties "united in interest."

Estate of Kasson (1900), 127 Cal. 496, 59 Pac. 950.

A natural corollary to such right is the right to have the jury know of the "limited effect" of anything brought out on cross-examination, *i. e.*, to know that a co-defendant may question the witness, as of right, without being bound by the testimony in the sense that such testimony binds the defendant who calls the witness. Refusal of the Court to so inform the jury is error and misconduct.

The refusal of this instruction is regarded as analogous, and indeed very close, to the more common situation where evidence is admitted for a limited purpose, *e. g.*, impeachment. In such cases it is uniformly established that the Court's refusal to instruct the jury that the evidence has only a limited purpose and effect is error.

Adkins v. Brett (1920), 184 Cal. 252, 258, 193 Pac. 251;

People v. Peck (1919), 43 Cal. App. 638, 648, 185 Pac. 881;

People v. Corey (1908), 8 Cal. App. 720, 97 Pac. 907.

VI.

Prejudicial Error Occurred in Limitation of Appellants' Right of Cross-Examination.

No right is more precious in a criminal proceeding than the right to cross-examine the witnesses with whom the accused is confronted, to test their stories, and to draw out testimony placing the defendant in a more favorable light. This is doubly true where from the testimony the jury must determine whether the defendants were dealing in good faith or pursuant to a fraudulent scheme.

In the cross-examination of David H. McFarland, the Court arbitrarily refused to allow questions to explain the complaints about delays in filling orders by proof that a shortage of materials developed and that defendants made strenuous effort to supply customers. [R. 441, lines 11-25; 442, lines 8-25; 444, lines 3-25; 447, lines 18-25; 448, line 1, through 449, line 22.]

The rule is well established that limitation of the right of cross-examination—even on such a comparatively unimportant point as whether a witness may be biased by reason of being in official custody—is reversible error. In the leading case of *Alford v. U. S. A.* (1931), 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77, Mr. Justice Stone, speaking for the unanimous Court and reversing a conviction of mail fraud because objection was sustained to a single question, stated:

“It is the essence of a fair trial that a reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.”

Accord:

Hanger Inc. v. U. S. A. (App., D. C., 1947), 160
F. 2d 8;

People v. Westlake (1899), 124 Cal. 452, 57 Pac.
465;

People v. Pantages (1931), 212 Cal. 237, 297 Pac.
890.

The reason that limitation of this basic procedural step is regarded as in itself a miscarriage of justice is that it is the chief defensive weapon to test the intelligence, memory, impartiality, veracity and integrity of adverse witnesses.

The Ottawa (1866), 3 Wall. 268, 18 L. Ed. 165.

Hence, the courts say it is an absolute right, not a mere privilege which the trial court may tamper with in the exercise of a sound discretion.

Gallaghan v. U. S. A. (C. C. A. 8th, 1924), 299
Fed. 172;

Kirk v. U. S. A. (C. C. A. 8th, 1922), 280 Fed.
506;

York v. U. S. A. (C. C. A. 6th, 1924), 299 Fed.
778;

Haussener v. U. S. A. (C. C. A. 8th, 1925), 4 F.
2d 884.

Conclusion.

Appellants respectfully submit, therefore, that the interests of substantial justice may best be served by reversing the judgments of conviction herein, on all the grounds stated in this brief, and by returning the matter for a new trial in accordance with the standards set by the due process clause of the Constitution.

Respectfully submitted,

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